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No. 91-141

In The Supreme Court of the United States October Term, 1991

CITY OF ROLLING MEADOWS, MAYOR OF ROLLING MEADOWS and CITY COUNCIL OF ROLLING MEADOWS,
Petitioners,

v.

THEODORE M. KUHN and the SOCIETY OF SEPARATIONISTS, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the First Amendment prohibit a pervasive municipal seal which permanently identifies that municipality with one particular religion, in preference to all other religions?

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OPINION BELOW

The Petition omitted that the March 19, 1991 opinion of the United States Court of Appeals for the Seventh Circuit was reported at 927 F.2d 1401 (7th Cir. 1991).

STATEMENT OF THE CASE

City petitioners' Statement of the Case omits the following:

The City has admitted that the seal pictures the Christian Cross in front of the Community Church of Rolling Meadows, a leaf, a single-family residence and a water tower

with two industrial buildings (R.76, Plaintiffs' Statement of Material Facts, ¶14; R.80, 81; R.82, Att.K-1,-2).

According to a publication of City petitioners, "The Cross in the City's seal symbolizes the importance of religious activity" (R.76, Ex.7).

The Community Church of Rolling Meadows and its Cross depicted on the seal were not the first or oldest existing church building and Cross in Rolling Meadows (R.82, Atts.I-L). There is no evidence in the record that the church or Cross depicted on the seal has any historical, architectural or artistic significance to the City of Rolling Meadows (R.80, 81).

The Rolling Meadows city seal does not include the symbols of any religion or philosophy other than Christianity (Petition, p.3).

In addition, City petitioners inaccurately state that their city seal was drawn by a child. In fact, city petitioners commissioned an artist, Carl Bergland, to draw the seal, based upon the child's design (R.81, Ex. B). Mr. Bergland substantially changed the child's drawing by replacing a picture of a bird with an industrial scene and by replacing a picture of a tree with a leaf (3a).

The City's Petition also omits the fact that the seal is found on the residents' garbage sacks (4a). Also, while City petitioners now deny that the seal appears on fire trucks, they admitted in their Answer to the Complaint that, "The emblem or seal is painted on all City-owned vehicles..." (R.76, Complaint¶16, Ans. ¶16;3a).

REASONS FOR DENYING THE WRIT

The Petition raises two issues regarding standing: (1) Are respondents' allegation of mere psychological injury legally sufficient? and (2) Need respondents prove the truth of their allegations? Neither issue is presented in this litigation because (1) respondents alleged more than psychological injury and (2) respondents did prove the truth of their

allegations. Moreover, City petitioners have twice waived issue (2) by failing to raise it both in the district court and in the appellate court. (Question (1) can be raised by a party at any time or by the court *sua sponte.*)

As to the First Amendment issue, a pervasive municipal seal which continuously identifies the municipality with one particular religion, in preference to all other religions or philosophies, violates the Establishment Clause. Moreover, City petitioners have not cited any judicial decision upholding the constitutionality of government seals featuring sectarian religious imagery. Finally, City petitioners have submitted no evidence that sectarian government seals or resulting litigation occurs with any frequency.

I. STANDING

A. This Case Does Not Present The Issues Raised By Petitioners

The Petition raises two questions regarding standing: (1) Are respondents' allegations of mere psychological injury legally sufficient in Establishment Clause litigation? and (2) need respondents only allege the required elements of standing or must they prove them? But neither question can be at issue here since (1) respondents' allegations of standing went well beyond mere psychological injury and (2) the factual bases of respondents' allegations of standing were proved twice when City petitioners twice admitted them.

In addition to mere psychological injury, respondent Kuhn also alleged alteration of behavior. The Third Amended Complaint (R.34) alleged that

> 7. Mr. Kuhn avoids the use of any public property in the City of Rolling Meadows. This includes the Chamber of City Hall as well as all other public buildings and offices;
>
> 8. Mr. Kuhn has stated that he mightily strives to avoid any visual contact with the seal of the City of Rolling Meadows. He will often avoid using the route

> to the downtown area of Rolling Meadows, which is also a primary and often traveled route to the City of Chicago, where the seal of the City of Rolling Meadows is most prominently displayed.

In addition, respondent Kuhn attached to his motion for summary judgment (R.76) his affidavit[1] alleging the following:

> 5. In order to avoid seeing the Rolling Meadows Seal, I avoid public offices of the City of Rolling Meadows such as the City Hall and the Public Works Building.
>
> 6. In order to avoid contact with the Rolling Meadows Seal, I attempted to use a garbage bag without the Rolling Meadows Seal, but the City refused to pick up the garbage because it was not in an official Rolling Meadows garbage bag with the Rolling Meadows Seal.
>
> 7. In order to avoid contact with the Rolling Meadows Seal on my motor vehicle tax sticker, I avoid looking at the right side of my car's windshield.

The appellate decision expressly stated "that the plaintiffs may be offended by the seals of Rolling Meadows and Zion does not confer standing" (9a). Rather the appellate court in establishing standing relied upon respondent Kuhn's alleged injuries which were more concrete than mere psychological injury (9a, 13-17a). Thus, this lawsuit does not present the issue raised by petitioners as to the legal sufficiency of allegations of mere psychological injury.

Similarly, respondent Kuhn did prove the truth of his allegations of standing. As described above, respondents' motion for summary judgment included an affidavit by respondent Kuhn containing his detailed allegations of

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[1] The plaintiff's standing is established by the injury allegations either of the complaint or of affidavits. *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 65(1987).

standing (R.76). Despite having taken respondent Kuhn's deposition, City petitioners never submitted any affidavit or other evidence disputing any of the aforementioned alleged facts of Kuhn's affidavit. Therefore, as the appellate court noted (12-13a), Federal Rule of Civil Procedure 56(e) mandates that respondents' uncontested factual allegations be taken as proved.

Moreover, City petitioners, as a matter of law, admitted the truth of respondent Kuhn's allegations of standing on another and independent basis. Respondents' October 25, 1988 Motion For Summary Judgment's Statement of Material Facts stated:

> 7. In order to avoid seeing the Rolling Meadows Seal, plaintiff Kuhn avoids public offices of the City of Rolling Meadows such as the City Hall and the Public Works Building.
>
> a. Kuhn affidavit
>
> 8. In order to avoid contact with the Rolling Meadows Seal, plaintiff Kuhn attempted to use a garbage bag without the Rolling Meadows Seal, but the City refused to pick up that garbage because it was not in an official Rolling Meadows garbage bag with the Rolling Meadows Seal.
>
> a. Kuhn affidavit
>
> 9. In order to avoid contact with the Rolling Meadows Seal on his motor vehicle tax sticker, plaintiff Kuhn avoids looking at the right side of his cars' windshield.
>
> a. Kuhn affidavit (R.76).

In response to respondents' Statement of Material Facts, City petitioners did not file any controverting statement of material facts (R.80). United States District Court for the Northern District of Illinois General Rule 12(m) mandates that "All material facts set forth in the statement required

of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party."

Since City petitioners twice admitted the truth of respondent Kuhn's allegations of standing, this case does not present the issue of the legal consequences of a plaintiff's failure to prove allegations of standing.

B. City Petitioners Have Waived Standing Issue (2)

Moreover, the City twice waived the issue as to the factual basis of respondents' allegations of standing by failing to raise it both in the district court and the appellate court. (While the legal sufficiency of plaintiff's allegations of standing can be considered by a court *sua sponte* at any time during litigation, any challenge to the factual basis of those allegations must be made by defendants in the district court and then again in the appellate court.) As this Court has noted, "...if the plaintiffs' 'allegations [of standing] were in fact untrue, then the [defendants] should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact.' " *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987), quoting *United States v. SCRAP*, 412 U.S. 669, 689 (1973).

City petitioners filed in the district court a motion for summary judgment (R.109), but did not include in that motion, or in any other filing, any challenge to the factual basis of respondents' standing. The Petition emphasizes that in the district court City petitioners challenged respondents' standing, but those challenges were always to the legal sufficiency of respondents' allegations of standing, never to the truth of respondents' allegations of standing. Nor did the City petitioners at any time during its appeal challenge the truth of respondents' allegations of standing. Thus, City petitioners have twice waived the issue as to the factual basis of respondents' allegations of standing and can not raise it for the first time in their petition for a writ of certiorari.

II THE ESTABLISHMENT CLAUSE

A. The Result Was Correct Because The City Seal Officially Identifies The City Continuously With One Particular Religion.

The Rolling Meadows Seal selects for depiction four of the multitudinous aspects of that community. One of those four aspects featured is Christianity, represented by its principal symbol, the Christian Cross. The seal does not depict the symbols of any other religions (or any secular philosophy). Furthermore, the seal of Rolling Meadows is the official symbol of that municipality. A reasonable observer views the permanent placement of the Christian Cross on such a seal as communicating that the Rolling Meadows municipality honors and identifies with one religion and one religion only---Christianity. Moreover, this sectarian seal is observable throughout the City.

Such a dramatic symbolic union of (one particular) church and state is unconstitutional under even the most restrictive interpretation of the reach of the Establishment Clause. Even those who would overturn the standard of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and would permit governmental preference for religion over irreligion and nondiscriminatory aid to religion, affirm that the Establishment Clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations." *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (J. Rehnquist, dissenting). The case at bar involves government preference among religions.

If the City's seal were constitutional, government bodies throughout the nation could officially identify themselves exclusively with Christianity, thereby ordaining an officially-preferred religion.

B. City Petitioners Have Not Cited Any Conflicting Lower Court Decision.

Petitioners have not cited a single federal district court

or appellate decision finding constitutional sectarian religious imagery on a government seal. On the contrary, in *Friedman v. Board of County Commissioners, Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (in banc), the Tenth Circuit Court of Appeals in banc held that the Christian Cross on the Bernalillo County seal violated the Establishment Clause despite the historical significance of Catholicism in the founding of that New Mexico county. This Court denied a resulting petition for a writ of certiorari at 476 U.S. 1169 (1986).

C. Petitioners Have Not Cited Any Conflicting Supreme Court Decision

City Petitioners are unable to cite any Supreme Court decision holding constitutional sectarian religious symbols on government seals.

On pages 18-19 of its Petition, the City notes that in this Court's most recent Establishment Clause decision, four justices expressed misgivings regarding the *Lemon* test. *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 655-56, 109 S.Ct. 3086, 3134 (1989) (Kennedy, J. dissenting). But even those four dissenting justices favorably cited the aforementioned Bernalillo County, New Mexico seal decision and indicated that they would hold unconstitutional a Christian Cross continuously and obstrusively affixed onto a symbol of government power. In Justice Kennedy's words,

> Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. *Cf. Friedman v. Board of County Comm'rs*

of Bernalillo County, 781 F.2d 777 (CA 10 1985) (en banc) (Latin cross on official county seal).

Id., 492 U.S. at 661, 109 S.Ct. at 3137. Therefore, even if a majority of this Court wished to overturn the *Lemon* standard, this case would not present a suitable opportunity to do so.

D. Sectarian Religious Imagery on Government Seals Rarely Occurs and Has Generated Few Lawsuits

City petitioners have not established that this litigation is of national significance. There is no evidence that the federal government has ever placed sectarian religious symbols on its governmental seals. Nor have City petitioners demonstrated what percentage of local and state seals contain sectarian religious imagery. Certainly, few lawsuits have concerned this subject matter.

City petitioners argue that his litigation has ramifications for all Establishment Clause litigation. Yet the factual circumstances here combining (1) the principal symbol of one and only one particular religion, (2) permanently joined with (3) the official symbol of government power, and (4) pervasively displayed throughout the jurisdiction are rarely equaled in Establishment Clause litigation.

Certainly, the logic of the Seventh Circuit decision does not apply to factual situations in which the government is not discriminating among religions. Nor does it apply to situations in which the government is not closely identifying itself with religion. Thus the logic of the appellate decision does not prohibit the city name St. Louis, which, unlike the Christian Cross, has lost its religious connotations in popular understanding. Nor does it apply to nonsectarian prayer. Nor to prayer which is not perceived as being officially identified with the government.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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